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Judgments

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The foregoing phases of motions for new trials are mostly statutory or provided for by court rules, as, for instance, in the federal jurisdiction, hence one must be careful in attempting to draw analogies between cases of any two jurisdictions. One hopes that South Carolina will soon have many of the practical time-saving rules now functioning in the federal courts.

JUDGMENTS

Sections 10-1201, 10-1213, 10-1501 to 1538, 10-1542, 7-5, 15-770 and 15-1762, should be thoroughly analyzed and their annotations up-to-date carefully studied.

Costs Not Part of a Judgment: It should be kept in mind that in South Carolina in a *law case,* as distinguished from an *equity case,* costs are no part of a judgment. They shouldn't be alleged in any pleadings as they are never in issue. They are purely statutory and never come into the legal picture until a law case has been finally decided; that is, by a judgment rendered, or unless a statute, such as Section 10-1537, provides that costs shall be a part of the judgment. Then only do costs come on the scene and if there is a dispute concerning them, the clerk of court is the judge and it is only when he makes an error that the trial judge comes on the scene by way of appeal from the clerk's decision. So one shouldn't follow the judgment forms.

Forms of Judgments: Need a judgment be in writing? In this state, No. And when it is, no particular form is required, but it must be intelligible and definite. *Town of N. Augusta v. Fennell* (1952), 221 S. C. 112, 69 S. E. 2d 121, gives one the rule beginning at page 115:

> When the jury returned to the court room, the verdict of guilty was delivered orally by the foreman, whereupon the mayor, addressing the jury, asked them if their verdict was that of "Guilty". All of the jurors promptly answered in the affirmative. This verdict was rendered in open court, and appellant, who was represented by his present counsel, raised no question or objection about the verdict's not being reduced to writing.
>
> In accordance with the common-law practice, a legal verdict implies a published verdict, delivered orally in court. 53 Am. Jur., Sec. 109, Page 700. And as stated in

23 C. J. S., Criminal Law §1394, page 1074, "In the absence of statute it is not essential to the validity of a verdict that it should be written; the jury may announce it to the court by word of mouth. However, it is proper for the jury to put their verdict in writing, and in some jurisdictions it is required by statute that the verdict shall be reduced to writing, although it has been held that such a statute is directory and that, notwithstanding the statute, an oral verdict is not necessarily void."

As announced in *State v. Waring*, 109 S. C. 52, 95 S. E. 143, we have no statute in this state or rule of court changing the common-law rule that verdicts in criminal cases may be oral. The foregoing case, *State v. Waring*, is cited with approval in *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

A verdict of a jury orally presented in open court, properly published and assented to by the jury, is legal and binding, although not in writing.

While we have no statute requiring that a verdict rendered by a jury should be written or endorsed on the warrant or indictment, the practice invariably followed in this state is to have the verdict written on the indictment and signed by the foreman. And in order to avoid any misapprehension, it might be well for us to say here that we certainly do not advise or advocate a departure from our settled custom.

When is Judgment on Pleadings usable? It is a "drastic procedure" but *U. S. Casualty Co. v. Hiers et al.* (1958), ___ S. C. ___, 104 S. E. 2d 561 holds that such a judgment is permissible under certain circumstances.

When is there a Judgment, and Who Signs It? There is a marked difference between the end or purpose of the common law action and the end or purpose of the proceeding in equity. In the matter of the proceeding in equity the end being sought is a determination of the issues by the judge sitting as chancellor and evidencing the same by a decree signed by the judge and directing a party to do some particular thing or refrain from doing some particular thing. This decree of the judge who acts in person in signing it, when entered upon the court records in the office of the Clerk of Court is entitled to full faith and credit throughout the United States.

The end of the action at law is the rendition and publication of the verdict of the jury. The judge signs nothing and the publication of the verdict marks the end of the judicial process and this really amounts to a fiat of state just as much so as though it had been a proper enactment of law by the legislature. From the time of the publication of the verdict it is the clerk and the plaintiff, and where an execution is issued then is added the sheriff, who proceed down an administrative corridor which began with the publication of the verdict. See Glenn and Redden, Cases and Material on Equity, 2d edition, page 22. See *Clark vs. Melton,* 19 S. C. 498, 507.

Where a jury trial is waived then the judge does sign something, that is, he signs an order for judgment and as a rule at the time of the trial announces his judgment. From this time on it is the officers of the court who are performing the ministerial acts which give life to the judgment.

In default cases that are submitted to the court and do not need the verdict of a jury, the judge likewise signs an order for judgment.

Under Section 15-1767, the Clerk of Court is required to keep certain books, one of which is "Court of Common Pleas Journal." In this journal he is required to record a full account of the proceedings of the court from its opening to its adjournment. This really amounts to a minute book (in addition to this journal the clerk is directed to keep a book entitled "Pleadings and Judgments," in which all orders are entered and it is customary for the clerk to keep another book called "Minute Book," in which orders and decrees in equity cases chiefly are recorded).

Section 10-1458 directs that upon receiving a verdict the clerk shall make an entry in his minutes, specifying the time and place of trial, the names of the jurors and witnesses, and the verdict. The "minutes" referred to here are apparently the journal of the Court of Common Pleas above referred to.

Section 10-1605 indicates the next step, and that is an application on the part of the prevailing party upon notice of five days where the attorneys do not live in the same city or of two days where the attorneys for the parties do live in the same city, to tax the cost and to insert the cost so taxed in the entry of judgment.

Section 15-1727 requires the clerk to sign officially all judgments and state the time when each is signed and entered.

By the foregoing authority and direction the clerk then, upon motion of the attorney for the successful litigant prepares, signs, and seals a formal judgment. It is customary for the attorney in whose favor the judgment is rendered and upon whose motion the judgment is rendered, likewise to sign the judgment.

However, the Act of 1839, now Section 15-1727, is "simply directory." As declared in *Hardin v. Melton* (1887), 28 S. C. 38, at page 46, quoting from an earlier case:

> . . . On this subject the court said: "And even as to third parties, while the date and the official signature of the clerk would best authenticate the judgment and put it beyond dispute, yet as to its effect as notice, the filing is the main matter; when entered and filed in the proper office, its existence could be as well ascertained without the date and signature as with them. The entering and filing are the essential facts, and whether this had taken place at a particular time could be discovered by an examination of the office as certainly where the formula had not been dated and signed as if these things had been done." And again: "The act of 1839 does not declare that judgments not dated and signed shall be void; it simply directs the clerk to date and sign. * * * It would be a most stringent construction to hold that because of such omission the whole proceeding was void." And especially so, we would add, when all other requirements had been complied with, to wit, entry in the book of Abstracts of Judgments, enrolment, etc., etc. "This we cannot suppose was the object of the act. On the contrary, we are of opinion that the omission here was a mere irregularity in a matter not vital to the judgment, but simply directory to the clerk, and may be corrected at any time" — citing *Farrar's Administrator v. Carmichael, 1 Brev.*, 392; and *Harrison v. Manufacturing Company*, 10 *S. C.*, 290.

Entry of Judgments: Section 10-1541 requires the clerk to keep "abstract of judgments." This is a book for the entry of judgments.

Section 10-1542 states, "In this book shall be entered such case wherein judgment may be signed, — " This section sets

out what information is to be placed upon the abstract of judgment.

Section 10-1543 provides for the interested attorney or the clerk, immediately upon entering the judgment, to attach together and file the papers in the cause, such as summons, pleadings, judgment, verdict, report, and the like. In the creation of a judgment lien it is the entry of the judgment upon the abstract of judgments that is essential and starts the life of the lien and provides the legal basis for issuance of an execution.

Under Rule 3 of the Circuit Court a judgment cannot be entered and thereby become a lien or be the basis for issuing an execution until five days after the rising of the court except with special leave of the court itself. And if the attorney for the successful party desires judgment to be entered earlier than five days after the rising of the court and can show a good cause therefor to the Judge the court will pass the appropriate order.

If one is obtaining a judgment in a county court, one must know his county court Act, since they vary in the several counties. In Richland County a judgment in the county court can be entered upon the day of its rendition, except when based on a jury verdict. It would seem that Circuit Court Rule 3 will apply in the latter event.

The South Carolina case of *Eason v. Miller and Kelley* (1880), 15 S. C. 194, shows one how necessary it is for an attorney to be present when a verdict is being published so as to get it in proper form. If not, a judgment based thereon will be no better than the verdict and would have to be vacated.

Forms of Verdicts in Claim and Delivery: In this connection attention is called to Sections 10-1453 and 10-1455 with reference to the form of verdict in claim and delivery cases. It will be seen that it is very important that the attorneys in such a case examine the verdict as it is published to see that it conforms to the statutory requirements. If this isn't done there is the chance of a client's right being seriously jeopardized.

One of the most important cases under Section 10-1453 is *Wilkins v. Willimon* (1924), 128 S. C. 509, 122 S. E. 503, wherein the Court called attention to certain requirements of the Section as being mandatory and sets forth the form which

must be used under a given set of circumstances. Beginning at the bottom of page 512 one finds:

> It will be particularly noted that the record shows that the plaintiff in the original proceeding "claimed the immediate delivery" of the property and gave bond according to the statute; that the Sheriff seized the property; that the defendant exercised his right to a redelivery of it under Section 474 and was in possession of it at the time of the trial. This is important, as will be seen, in determining the proper form of verdict and judgment, under these circumstances, in the event that the plaintiff prevails before the jury, in the original claim and delivery action.
>
> Sections 542 [now Section 10-1453] and 600 [now Section 10-2516] of the Code must not be confused. The one regulates the form of the verdict in claim and delivery; the other the form of the judgment; the one is mandatory; the other directory and optional, as the circumstances may require. The form of the verdict and the form of the judgment vary according to the proceedings which may have been taken in reference to the possession of the property and to the conclusion arrived at by the jury upon the merits of the case.
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> The record in a case of claim and delivery will necessarily show: (1) That the plaintiff has given bond and secured possession of the property, retaining the same, the defendant not having exercised his right of redelivery under Section 474, but by his answer claiming a return of the property; or (2) that the plaintiff has not given bond and thereby secured possession of the property, the same remaining in the possession of the defendant; or (3) that the plaintiff has given bond and the defendant has secured a return of the property from the Sheriff under Section 474.
>
> Condition 1: Where the plaintiff has given bond and secured the possession of the property, retaining the same, the defendant not having exercised his right of redelivery under Section 474, but by his answer claiming a return of the property.
>
> Whether the verdict be in favor of the plaintiff or of the defendant, Section 542, is mandatory, that "the

jury shall assess the value of the property." A verdict, therefore, in favor of the plaintiff, should be:

"We find for the plaintiff the right to the possession of the property described in the complaint, the value of which is assessed at ($_____) dollars, together with ($_____) dollars damages for the wrongful detention thereof by the defendant" (if such damages be alleged and proved).

Under Section 600 the judgment entered upon this verdict should conform to the verdict.

A verdict for the defendant should be:

"We find for the defendant the recovery of the possession of the property described in the complaint, the value of which is assessed at ($_____) dollars, together with ($_____) dollars damages for the wrongful taking and detention thereof by the plaintiff" (if such damages be alleged and proved).

Under Section 600, the judgment entered upon this verdict should be:

"That the defendant recover of the plaintiff the possession of the property described in the complaint, or in case delivery cannot be had for its value ($_____) dollars, together with ($_____) dollars damages for the wrongful taking and detention thereof by the plaintiff." [Cases cited.]

Condition 2: Where the plaintiff has not given bond and thereby secured possession of the property, the same remaining in the possession of the defendant.

If the verdict should be in favor of the plaintiff, Section 542 is mandatory that "the jury shall assess the value of which is assessed at ($_____) dollars, together with ($_____) dollars damages for the wrongful detention thereof by the defendant" (if such damages be alleged and proved).

Under Section 600, the judgment entered upon this verdict should be:

"That the plaintiff recover of the defendant the possession of the property described in the complaint, or in case a delivery thereof cannot be had, for its value ($_____) dollars, together with ($_____) dollars

damages for the wrongful detention thereof by the defendant." *Bossard v. Vaughn,* 68 S. C., 96; 46 S. E., 523.

If the verdict should be in favor of the defendant, it appears from the case of *Finley v. Cudd,* 42 S. C. 121; 20 S. E., 32, that under these circumstances it would not be necessary for the jury to assess the value of the property, and that a verdict in this form would be sufficient: "We find for the defendant the right to the possession of the property described in the complaint"; the property always having been in the possession of the defendant no damages could be allowed for taking or detention. Under Section 600 the judgment entered upon this verdict should conform to the verdict.

Condition 3: Where the plaintiff has given bond, and the defendant has secured a return of the property from the Sheriff under Section 474.

If the verdict should be in favor of the plaintiff, Section 542 is mandatory that "the jury shall assess the value of the property," and in such case the verdict should be:

"We find for the plaintiff the recovery of the possession of the property described in the complaint, the value of which is assessed at ($_____) dollars, together with ($_____) dollars damages for the wrongful detention thereof by the defendant" (if such damages be alleged and proved).

Under Section 600 the judgment entered upon this verdict should be:

"That the plaintiff recover of the defendant the possession of the property described in the complaint, or in case a delivery thereof cannot be had, for its value ($_____) dollars, together with ($_____) dollars damages for the wrongful detention thereof by the defendant." *Bossard v. Vaughn,* 68 S. C., 96; 46 S. E., 523.

If the verdict should be in favor of the defendant, it appears from the case of *Finley v. Cudd,* 42 S. C., 121; 20 S. E., 32, that under these circumstances it would not be necessary for the jury to assess the value of the property, and that a verdict in this form would be sufficient:

"We find for the defendant the right to the possession of the property described in the complaint, together with

($_____) dollars damages for the wrongful taking of the property by the plaintiff."

Under Section 600 the judgment should conform to the verdict. As a matter of course if the verdict should embrace a part only of the property described in the complaint, the necessary changes in the forms of verdict and judgment indicated should be made. Where the defendant interposes a counterclaim, the proceeding under Section 542, second subdivision, [now Section 10-1455], will be had.

Vacating a judgment: Under Section 10-1213 this must be done within a year unless the judgment is void. In the latter event it can be vacated at any time, even on the court's own motion. But it seems that one has to go back to the trial court to have it vacated and also to have it stricken from the Abstract of Judgments if it has been entered thereon. And such vacating can now be done at chambers, regardless of the erroneous annotation under Section 10-1213. See Section 15-233 which also has erroneous annotations as to judge's powers.

Usually a mistake of law cannot be the basis for relief against a judgment, but after all it depends on the circumstances. As said in *Savage v. Cannon* (1944), 204 S. C. 473, 30 S. E. 2d 70, at page 476:

> In order to prevail on a motion to vacate a judgment under Section 495 of the Code, the mover must show (1) that the judgment was taken against him "through his mistake, inadvertence, surprise, or excusable neglect"; and (2) that he has a meritorious defense. *Gaskins v. California Insurance Co.*, 195 S. C., 376, 11 S. E. (2d), 436. Appellant contends that respondent has failed to meet either of these requirements. We shall discuss them in the order stated.
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> As to the first requirement, appellant states that the erroneous belief of defendant's attorney that the time for answering was extended by a demand for an itemized statement of account, was an error of law and not an error of fact. It is argued that the rule in this State is that the provisions of Section 495 [Sections 10-609 and 10-1213] of the Code apply only to mistakes of fact, not to mistakes of law. As a general rule this is true. *Lucas v.*

North Carolina Mutual Life Insurance Co., 184 S. C., 119, 191 S. E., 711; *Anderson v. Toledo Scale Co.*, 192 S. C., 300, 6 S. E. (2d), 465. But relief has been granted, although the mistake might be termed one of law, rather than of fact, where the litigant uses due diligence in employing counsel, who took prompt steps to protect the interests of his client according to what he conceived to be the proper practice, but allowed his client to get in default through a mistake as to the proper procedure.

The court further said at page 477, quoting from Johnson v. Finger:

> "While it is important that the statutes and rules of court which are designed to promote the speedy and orderly determination of causes should be complied with, it must not be forgotten that their purpose is to aid the administration of justice; and they should not be applied so as to defeat it. Of course, a party who is wilfully or inexcusably in default, or one who gets himself into that predicament by resorting to technical and dilatory practice or motions without merit and for the purpose of hindering and delaying the opposite party in bringing the cause to a hearing on the merits, deserves no consideration from the court.

The opinion finally determined on page 480:

> In conclusion, we see no abuse of discretion on the part of the Circuit Judge. On the contrary, we think his discretion was properly exercised. As stated by the Court in *Gaskins v. California Insurance Co., supra,* the power given to the Courts to grant relief by the section of the Code under consideration should be exercised "in the same spirit in which the Code section was designed, — in furtherance of justice and in order that cases may be tried and disposed of upon their merits."

The relief provided by Section 10-1213 is exclusive and where there is lack of due diligence by a party resulting in a default judgment even this relief is of no avail. *Brock v. Brock* (1954), 225 S. C. 261, 265, 267; 81 S. E. 2d 898.

Amendment of judgment: In this State a judge can always correct a mere clerical error, even after the court term has ended and upon an ex parte motion, and possibly upon the judge's own motion. But if not clerical, there must be a

notice and a hearing. *Chafee and Co. v. Rainey* (1883), 21 S. C. 11.

As Justice McIver said at page 17:

> "*** It is, nevertheless, to be observed, that it is a principle of the court, that no alteration can be made in a decree on motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given."
>
> It is said, however, that even granting the power to make the correction, it could not be exercised upon a mere ex parte motion without notice to the adverse party. Where the error corrected is purely clerical, as in this case, we can conceive of no reason why notice should be given to the adverse party. It is a matter solely for the consideration of the judge who committed the error. And what light the adverse party, if notified, could throw upon the question, whether the error complained of is a clerical error, we do not readily perceive . . . .

South Carolina hasn't said as yet that, if after term time, it should be done only on notice to the adverse party. For such clerical error an amendment can be made, even after execution and 11 years after a judgment has been rendered. *Huggins v. Oliver* (1883), 21 S. C. 147. That case declared at page 155:

> The plaintiffs contend that the defects in the judgment and execution amounted to more than mere irregularities and made them void, or at least that they furnished no sufficient authority for the sale of the land of the intestate; and that the order of the Circuit Judge granting leave to amend, not having been made upon the motion of a party to the action in which the judgment was recovered, within a reasonable time, was without authority of law, and too late to effect the title to the land sold under such judgment. We think the following authorities show that these positions cannot be maintained: D'Urphey v. Nelson, 1 Brev., 289; Hubbell v. Fogartie, 1 Hill, 167 [26 Am. Dec. 163]; Giles v. Pratt, 1 Hill, 239 [26 Am. Dec. 170] recognized as late as 1866 in Ashmore v. Charles, 14 Rich., 65. In D'Urphey v. Nelson, an amendment similar to the one made in this case was suggested by the court itself in the opinion granting a new

> trial. And in Giles v. Pratt a similar amendment was allowed at the trial term of the action brought by the purchaser at sheriff's sale to recover the land twelve years after the judgment was recovered, and upwards of eleven years after the sheriff's sale, the judgment having been recovered in October, 1820, the sheriff's deed being dated April 14, 1821, and the trial having taken place at fall term, 1832. As is said in Hubbell v. Fogartie: "It is every day's practice to permit judgments and executions to be amended according to the right of the case, even after a sale under execution;" and these remarks are substantially repeated in Giles v. Pratt.

See *Williams v. Ulmer* (1906), 73 S. C. 579, 53 S. E. 999, for what is not a clerical error.

Judgments by Consent: Such judgments and decrees are recognized in South Carolina. *Weathersbee v. Weathersbee* (1908), 82 S. C. 4, 62 S. E. 838, holds:

> . . . Title IV, which embraces sec. 144 [10-301, 1952 Code] uses the words, 'place of trial' as synonymous with venue. The place of the trial is the place where the action is brought, and where the record is preserved for the guidance of those who may be interested in land titles. The same statute directs how the venue may be changed from one county to another, and the record transferred thither. Until the record has been thus transferred, the trial is deemed to be had in the county named in the summons. In the instance under review, the place of the trial has always been in Barnwell, and the record is now there and has always been. The 'hearing' was only had in Bamberg, for the convenience of the parties, or their attorney. To conclude that the mere hearing of a cause across a county line would invalidate a judgment would be hazardous, and make the statute law an unreasonable thing. And if the letter of the record must be appealed to, it does not disclose that the 'hearing' was had at Bamberg, but only in the 'signing'. A Circuit Judge often hears in one county and signs in another county, a practice justified by necessity and by the decisions.

See also *Smith v. Lowery* (1900), 56 S. C. 493, 35 S. E. 129.

An attorney, however, should be very careful as to obtaining his client's permission if he is to consent as attorney. It is

best, when possible, to have the client consent in writing or orally in open court, or in writing at the bottom of the judgment or decree. As to a court's power over judgments by consent, see last paragraph under next topic.

Judgment by Confession Without Action: It should be noted that South Carolina has done away with the old common law warrant of attorney. *Otis Mills & Co. v. Dickson Mills* (1849), 6 Rich. 487, 492. Sections 10-1533 to 1538 now regulate judgments by confession, and it is significant that the defendant himself must make a written statement under oath containing the necessary data required by Sec. 10-1536. Also, the clerk not a judge, or magistrate, endorses the judgment on the statement.

As to a court's power over judgments by confession, South Carolina would most likely follow the general rule as laid down in *Sunderland v. Braun Packing Co.* (1912), 119 Ind. 125, 86 Atl. 126 2d, that such power is unlimited. By comparison it should be noted that such power is limited with regard to judgments by consent which are really contracts of the parties allowed by the court to be recorded to have the force and effect of a judgment. Hence, they can't be modified or corrected without consent of the parties. They can, of course, be vacated for fraud or mutual mistake of fact. South Carolina would probably follow this general rule also.

Agreed Case: This is purely statutory. See Sections 10-1201 and 10-1514. One of its most important features is that the *parties* and *not* the attorneys agree on the factual case. No action is necessary, thus eliminating all pleadings and incidental judicial steps. *Bradford v. Buchanan* (1893), 39 S. C. 237, 17 S. E. 501, at page 242, interprets Sections 10-1201 (formerly 374) as follows:

> . . . It was admitted that at the trial "the scope of the action was enlarged, and the entire tract of 325 acres was brought into the controversy by the counsel" of the parties "agreeing upon a statement of facts." But that could not be done simply by an agreement of counsel. Section 374 of the Code declares, that in submitting a controversy without action, "*the parties* to a matter in dispute may, without action, agree upon a case containing the facts upon which the controversy depends," &c. This court has lately decided in more than one case, that this cannot

> be done simply by an agreement of the counsel engaged. It may be said that the parties here, having confidence in their counsel, made no objection. This we do not controvert; but that is not enough. The record must show that the parties themselves signed the submission and agreed to the change of issue, so as to make the judgment binding upon them. This is not a mere formal technical matter, but touches the very root of the jurisdiction of the court. . . .

It is interesting to note that this Sec. 10-1537 provides for attorney fees to be added to the judgment as "costs" and that this is one of the two instances in which there is a provision for the allowance of attorney fees in so far as the Statutes of South Carolina are concerned. The other incidence is the provision for allowance of attorney fees in all partition proceedings now appearing as Sec. 10-2211.

Of course, there are statutory provisions for the payment of attorney fees in the United States Statutes. While we are on this subject (without going into federal statutory provisions for payment of attorney fees) it is further interesting to note that there are circumstances under which a court of equity will allow attorney fees as permissible costs. These are exceptional cases, for the general rule is that each party must pay his own attorney; and under this general rule, if an attorney is to be paid, it is to come as a result of contract with his client, expressed or implied.

The courts, of course, are interested in an attorney being paid for his services; however, (where an attorney is representing one or the other of the parties) in a domestic relations case, where the parties have not become reconciled and are back together, it is the advice of the courts to the attorneys involved not to disturb this reunited situation by pursuing claims for attorney fees and in reality they should pick up their papers and briefcases and quietly slip away.

As pointed out in *Nimmons v. Stewart* (1880), 13 S. C. 445 at page 447:

> The code of procedure repealed the laws in force at its adoption, upon the subject of costs, and changed the principle upon which they are allowed, but at the same time it provides "additional allowances in any action for the partition of real property." Gen. Stat. 651, § 334. The recent act altering the code as to costs, does not affect

this question. It has been held that these provisions, in the New York code, do not affect the equitable power of the court to grant counsel fees out of a common fund belonging to the parties, as part of the relief which should be given on the final disposition of the cause. Hotaling v. Marsh, 14 Abb. 161; 3 Wait's Pr. 494.

This was a proceeding in equity. Whether regarded as instituted by Hester Nimmons, as trustee, to raise the fund charged on the land for the support of her cestui que trust, Mary, or as heir-at-law of Isaac Anderson, for partition of the land, she was successful in both aspects of the action, and her expenses in having the proceedings conducted should be reimbursed either out of the interest for the support of Mary, or the proceeds of the sale under the prayer for partition. Certainly the whole expenses should not be thrown upon the interest set apart for the support of Mary. * * *

See also *Hubbard v. The Camperdown Mills* (1886), 25 S. C. 496, wherein it was declared at page 503:

As to the fee of Messrs. T. Q. and A. H. Donaldson, as attorneys for the Camperdown Mills and for the receiver, we think it was properly chargeable on the fund in the hands of the receiver. The corporation was a necessary party to the action, and as such had a right to employ and did employ these gentlemen as their attorneys, and certainly the assets of the corporation, now represented by the fund in the hands of the receiver, should be applied to the payment of such services as these gentlemen rendered as attorneys of the corporation. The authorities cited in the argument for these respondents fully show that the counsel fees of the receiver are properly chargeable on the funds in his hands. The receiver has a right to employ counsel to advise him as to the management of the property placed in his hands and as to his duties in the premises; and in this case judging from the expeditious manner in which this large business had been wound up, apparently to the satisfaction of all parties concerned, the receiver must have been well advised, and his counsel should be well paid for their services. * * *

See also petition of Crum in the case of *Johnson v. Williams* (1940), 196 S. C. 528, 14 S. E. (2d) 21, wherein it was stated at page 531:

> A review of the authorities shows that a Court exercising equitable jurisdiction may make an allowance of a reasonable fee out of the common fund or property created or preserved, for an attorney representing a party who, at his own expense, has maintained a suit for the recovery, preservation, protection, or increase of a common fund or common property, or has created or brought into Court a fund in which others are entitled to share.

Another feature which is mandatory is that the affidavit that "the controversy is real, and the proceedings in good faith" should be sworn to by the party and not by his attorney. In *Reeder v. Workman* (1892), 37 S. C. 413, 16 S. E. 187, at page 415, it is declared:

> We are met *in limine* with the question of jurisdiction. This question may be raised at any time during the trial of a case. *State v. Penny*, 19 S. C., 223. Unlike other questions, it may be raised for the first time in this court. *Bell v. Fludd*, 28 S. C., 315; *Hardin v. Trimmier*, 30 Id., 393. And the court, *sua sponte*, may raise it. *Pool v. Brown*, 12 S. C., 557. The case as brought in the Circuit Court was not an ordinary civil action, but was, to say the most for it, an attempt to submit a controversy without action for the determination of the Court of Common Pleas for Newberry County. Provision is made for the settlement of legal disputes in this way, and the law of such cases is contained in sections 374, 375, and 376 of the Code. It being, however, an extraordinary method of determining rights, the provisions of the statute must be strictly conformed to, in order to bind the parties or to confer jurisdiction upon the court.
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> . . . In the matter of submitting a controversy without action, the provision is that the *parties* may without action agree upon a case, &c., and present a submission of the same to any court which would have jurisdiction if an action had been brought. The question arises for the first time in this State, but the practice in New York is for the *parties* to sign the agreement. *Hobart College v. Fitzhugh*, 27 N. Y. (13 Smith), 134. It should certainly appear in some way that the parties have bound themselves by the agreement, and are to be bound by the decision, and not, as in this case, come afterwards and repudiate the whole proceedings. . . .

It is further declared on page 416 as to the necessary affidavit:

> Section 374 further provides as follows: "But it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties." This provision is mandatory. There was no such affidavit. It is only after it is in some way made to appear by the act of the parties themselves that they have agreed upon a case upon which the controversy depends, and present a submission of the same, &c., and shall have made it to appear by affidavit that the controversy is real, and the proceedings in good faith, &c., that "The court shall *thereupon* hear and determine the case," &c. This being the construction we feel required to place upon the section of the Code under consideration, our conclusion is that the case, as submitted to the court below, was not sufficient to give the court jurisdiction of the parties to the assumed controversy. . . .

Default Judgments: The following Sections with up-to-date annotations should be read: 10-1531 and 10-1532. (Compare Sections 586 of 1942 Code) 10-1507, 15-233, 10-648 and 10-1213.

Prior to 1953 an itemized and verified statement of account was mandatory. But *Jordan v. Tadlock* (1953), 223 S. C. 326, 75 S. E. 2d 691, joined the national trend in holding that substantial compliance is sufficient and hence a verified complaint with account attached and made a part thereof satisfied the Code Section. The annotated case of *Roberts v. Pawley* (1897), 50 S. C. 491, 27 S. E. 914, is not now the law in this regard. As said in *Jordan v. Tadlock, supra,* at page 330:

> Although respondent has not literally followed the terms of section 10-1531, there has been substantial compliance therewith which is sufficient. The statement of account is attached to the complaint, made a part thereof by appropriate allegation, and the complaint is verified by respondent before a notary public.

In the last paragraph of the Section 10-1531 "shall" has been changed to "may" by judicial sanction and it is now only directory that the order for judgment be "endorsed upon or attached to the complaint." However, to do so is the safer course as the order is less likely to be misplaced or lost.

So as to clearly understand the annotation to Section 10-1531 regarding *Nettles v. McMillan Petroleum Corp.* (1946), 208 S. C. 81, 37 S. E. 2d 134, and also the effect of several later cases mentioned below, it should be noted that Sections 10-1531 and 1532 were both parts of Section 586 of the 1942 Code. On May 29, 1939, an act was approved amending that Section, which was then Section 586 of the 1932 Code, and giving the court power to hear evidence in default cases in term time or at chambers. In that same year, the *Nettles* tort case of slander was begun. The demand was unliquidated. However, being an unliquidated tort case, it was held that the judge had no power to hear it without a jury.

The next case was *Arthur v. Devaux* (1950), 217 S. C. 256, 60 S. E. 2d 590. It was on an open account not verified. The Judge heard evidence at chambers in accordance with the amendment of 1939. It was held that he had that power, and the court appears to have restricted it to contract cases only.

As a result, the Act of 1953 (Acts of 1953, page 137) was passed giving the trial judges such power over both contract and tort cases, whether the demand be liquidated or unliquidated. There is no decision as of now directly applying this Act, but the *Patrick* case, post, reaffirmed the *Nettles* case and applied the rule therein to a like situation then before the Court. As *dictum,* but in language that leaves no doubt and is persuasive in argument, the Court said that the Act of 1953, which was not then applicable to the situation before it, henceforth clearly gave the trial judge power to take evidence without a jury in term time or at chambers in both tort and contract default cases, whether liquidated or unliquidated. So, after a decade and a half of more or less confusion there was clarity at last, and a very important step was made in saving time and expense.

As to the change made in default cases concerning a judge's power by the Act of 1953, *Patrick v. Wolowek* (1954), 225 S. C. 180, 81 S. E. 2d 717 explains at page 186:

> The Legislature, recognizing that under the existing law where the defendant had failed to answer, demur or otherwise plead to a complaint in actions in tort, and unliquidated damages are sought, it was necessary to have a jury pass upon the amount of damages, amended Section 10-1532 of the Code of 1952 by Act approved March 27, 1953, 48 St. at Large, p. 137, so as to include actions

in tort and unliquidated damages in the rendition of judgments by default by a Judge of the Court of Common Pleas without the aid of a jury.

Vacating a Default Judgment: In a motion to vacate a default judgment certain conditions are to be met in the discretion of the Circuit (or County) Judge. In applying Section 10-1213 it was declared in *Jenkins et al. v. Jones* (1946), 208 S. C. 421, 38 S. E. 2d 255, at page 423:

> "The power conferred upon courts to relieve parties from judgment taken against them by reason of their mistake, inadvertence, surprise or excusable neglect should be exercised by them in the same liberal spirit in which the Code section was designed — in furtherance of justice and in order that cases may be tried and disposed of upon their merits". *Ex Parte Union Mfg. & Powers Co.*, 81 S. C., 265, 62 S. E., 259, 128 Am. St. Rep., 908. "When therefor (sic) a party makes a showing of such mistake, inadvertence, surprise or excusable neglect, applies promptly for relief, after he has notice of the judgment, shows by his affidavit that *prima facie* he has a meritorious defense, and that he makes the application in good faith, a Court should not hesitate to set aside the default and allow him to serve an answer upon such terms as may be just under all the circumstances of the cases." *Savage v. Cannon*, 204 S. C., 473, 30 S. E. (2d), 70. *Gaskins v. California Ins. Co.*, 195 S. C., 376, 11 S. E. (2d), 436.

At page 427 it is further stated:

> . . . The Court does not attempt, on motions of this kind, to decide the case on its merits, but only decides whether a *prima facie* showing has been made of a meritorious defense. A very short delay will be had by setting aside the judgment taken in this cause as it is a matter that can be disposed of at Chambers and does not require the Court to be in session when it is decided on its merits. If there is merit in the Plaintiffs' case and if they can present the evidence entitling them to a judgment as against any evidence that might be put forth by the Defendant under this defense, only justice would have been done for the Defendant would then have had his day in Court.

> "In order to disturb or reverse the ruling of the Circuit Judge in matters of this kind, it is necessary to make a clear showing of an abuse of discretion, the Statute rests the granting of such a motion in the discretion of the Circuit Court and the exercise of this is conclusive unless it is patently wrong or, as has been sometimes unhappily phrased, unless the Court has abused its discretion." *Duncan v. Duncan,* 93 S. C., 496, 76 S. E., 1099.

See also *Simon v. Flowers* (1957), __ S. C., __, 99 S. E. 2d 391.

When is Default Judgment Appealable and When Void: Both these questions are answered in *Gadsden v. Fertilizer Co.* (1911), 89 S. C. 483, 72 S. E. 15 at page 487:

> The defendant appeals both from the order refusing its motion and also from the judgment. Ordinarily, no appeal lies from a judgment by default. *Odom v. Burch,* 52 S. C. 305, 29 S. E. 26. But where the defect in the judgment is radical, — that is, one which goes to the foundation of plaintiff's cause of action, or to the authority of the Court to render the judgment, it may be remedied by appeal. . . . The authorities, with practical unanimity, agree that a default admits only what has been pleaded, and that it does not forfeit or effect the rights of a defendant, except as to matters necessarily admitted by the default. 23 Cyc. 571. Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint; and so, if the complaint states facts which entitled plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default which gives a different kind of relief, or relief to a greater extent is without authority of law and cannot be sustained.

Note: The foregoing case is now out-moded in one respect by the Act of 1953, amending Section 10-1532, which gave the judge of a circuit or county court the power to try without a jury default actions in contract and tort actions involving damages whether liquidated or unliquidated. See in this connection the *Patrick* case, *supra.*

Rule as to Attorney's and Clerk's Duty: When obtaining an order for a default judgment, care must be taken to follow

circuit (county) court rule 15, not only by the attorney obtaining same but by the clerk in entering it.

Papers that Should be Ready for Obtaining a Default Judgment: The following necessary papers should always be prepared for presenting to the judge:

(1) Affidavit of attorney of no answer, etc. The following form is suggested:

State of South Carolina
County of
} In_____Court

John Doe,
Plaintiff
vs.
Richard Roe,
Defendant
} Affidavit of default.

Personally appeared_____, plaintiff's attorney, who being duly sworn says that no answer, demurrer or notice of appearance has been received or served in pursuance to the summons.

Sworn to and subscribed

before me this_____day _____

of_____19____ (L.S.)
Notary Public for S. C.

(2) The next paper to have ready to hand to the judge is the order of default. The following form is sugested:

Use the same caption as with the above affidavit, except that "Order for Default Judgment" is substituted on the right in place of "Affidavit of Default." The body of the Order will be:

It appearing that service of the summons and complaint was made on the defendant on the____day of_____19__, as shown by return of service of_____, dated the____day of_____19__, and no answer, notice of appearance or demurrer having been served,

IT IS ORDERED that the plaintiff have judgment against the defendant for Nine Hundred ($900.00) Dollars, and that judgment be entered immediately.

_____
Presiding Judge

_____, 19____

The judge's order should always recite the jurisdictional fact of proper service, as indicated above, so that it will be a part of the judicial record.

If there is no desire to obtain leave to by-pass Circuit Court Rule 3, then above form should have a period after the word "Dollars", and the last sentence be omitted. If, however, such leave is to be asked for, one must be prepared with affidavit or witness or both so as to make a proper showing why one's judgment lien or right to issue an execution should be placed ahead of other judgments of that term. Rule 3 does not apply in full force to all county courts, hence the necessity of knowing each county court's Sections in the Code. For example, as to the Richland County Court Section 15-766 doesn't require the application of Rule 3 unless there has been a jury verdict.

Attention is also called to the fact that "Attorney's Disbursements" are only such statutory costs or fees as have been paid in advance to clerk or sheriff, and to others not officers of the court, and to which the attorney would be entitled to reimbursement. In the meantime an entered judgment would be a protective security for same. See *Cureton v. Westfield* (1886), 24 S. C. 457. However that decision leaves one in some doubt as to when, if at all, costs paid in advance to clerks and sheriffs are really disbursements.

Attorneys should always be familiar with Section 10-472, which provides that no costs or disbursements for serving any process can be taxed against the losing party in a case *unless* such process is *served through the sheriff's office.*

Summary Judgment: South Carolina has no Summary Judgment. The nearest this state comes to that kind of judicial step is by Section 10-654 and Section 10-1505. The former provides for striking out sham or false defenses; the latter for adjudging a demurrer, answer or reply as frivolous.

It used to be in this state that upon the decision of either motion one could not get a default right then but had to await a *jury term* of court. Now under Section 15-233 which

gives a judge such broad powers at chambers a default judgment can be obtained at once. Even before that broad power was given, the judicial tendency was to allow for judgment at once in open court when an answer was stricken as sham. *Interstate Chemical Corp. v. Farmington Corp.* (1915), 100 S. C. 196, 84 S. E. 710.

Scope of Default Judgment: Code Section 10-1506 states the rule in South Carolina as to the relief to be awarded in a judgment; and in ascertaining the relief demanded it should be noted that a prayer for relief is not essential to a complaint in this state. *Balle v. Moseley* (1880), 13 S. C. 439. A failure to confine relief to the demand in the complaint is only on error of law, remediable by appeal and doesn't render a default judgment void. *McMahon v. Pugh* (1902), 62 S. C. 506, 509, 40 S. E. 961. On the other hand, if an answer is in, one is entitled to all relief consistent with the case as made, regardless of the relief as demanded in the complaint. *Ross v. Carroll* (1890), 33 S. C. 202, 11 S. E. 760, state at page 204:

> . . . While it is quite true, as stated in Pomeroy on Remedies, section 580: "If there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint," we are not prepared to admit that if this rule is disregarded the judgment would be thereby rendered void. It would be an erroneous judgment, which might be corrected by appeal, or perhaps by motion; but we do not see how it would render the judgment void where, as in the present case, the court unquestionably had jurisdiction of the subject matter, and where it is not denied that the court had acquired jurisdiction of the person against whom the judgment was rendered. . . .

Declaratory Judgment: South Carolina's old Section 660 was so limited in scope and so inclusive of what equity could otherwise do, that it was seldom used. It's limitations included only construction of a "deed, will or written contract". See *Desportes v. Id.* (1930), 157 S. C. 407, 154 S. E. 426, and *Ex Parte Darby* (1930), 157 S. C. 434, 154 S. E. 632.

A court can really go places now under the 1948 Act as found in Code Sections 10-2001 to 10-2014.

One should read carefully Judge Lide's article in the South Carolina Law Quarterly of September 1948.

See *Williams Furniture Co. v. So. etc. Co.*, (1949), 216 S. C. 1, 56 S. E. 2d 576 and *So. Ry. v. Order of Ry. Conductors* (1947), 210 S. C. 121, 41 S. E. 2d 774. This latter case, though dealing with old Section 660, nevertheless covers some of the basic principles relating to declaratory judgments and should be integrated with the later *Williams Co., supra,* and also with *Dantzler v. Callison, Attorney General* (1955), 227 S. C. 317, 88 S. E. 2d 65, which applies the Act of 1948, now Sections 10-2001 *et seq.* and declares on page 321:

> We are of the opinion that the Circuit Court was in error in sustaining the demurrer and ordering the complaint dismissed. It is well settled that where the complaint seeking a Declaratory Judgment sets forth a justiciable controversy it is not subject to demurrer on the ground that it fails to state a cause of action. " 'Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action.' " [Cases Cited]
>
> In passing on a demurrer in such cases, the court is not concerned with whether the plaintiff is right in the controversy, but is only concerned with whether he is entitled to a declaration of rights with respect to the matters alleged. " ' The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all. Even though the plaintiff is on the wrong side of a controversy, if he states the existence of a controversy which should be settled by the court under the Declaratory Judgment Law, he has stated a cause of suit.' " *Foster v. Foster,* S. C., 83 S. E. (2d) 752, 753.
>
> The use and determination of the demurrer in actions arising under the Declaratory Judgments Act is controlled by the same principles as apply in other cases. Applying these well settled principles to the disposition of this matter, we think that the complaint states a justiciable controversy which can only be properly and fully determined on a hearing on the merits. . . .

The *Williams Furniture Co. case, supra,* points out instances when declaratory relief can be invoked and also when not. The opinion states at page 7:

> Section 6 of the Act is as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Declaratory relief should not be accorded "to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Aetna Casualty & Surety Co. v. Quarles, supra.* Nor should such relief be granted when the remedy is invoked merely to try issues or determine the validity of defenses in pending cases. *Maryland Casualty Co. v. Boyle Construction Co., Inc., et al.,* 4 Cir., 123 F. (2d) 558. While declaratory relief will not be refused, if otherwise appropriate, merely because there is another remedy available or because of the pendency of another suit, *Employers' Liability Assurance Corporation v. Ryan et al.,* 6 Cir., 109 F. (2d) 690, these are factors which may be considered by the Court in determining whether its discretion should be exercised in favor of assuming jurisdiction. *Southern Railway Co. v. Order of Railway Conductors of America,* 210 S. C. 121, 41 S. E. (2d) 774. "The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." *Maryland Casualty Co. v. Boyle Construction Co., supra* [123 F. (2d) 564]

Since the Uniform Act, which like many other such Acts got its best start in the Federal jurisdiction, it would be wise to read the annotations under 28 USCA 400, and especially *Aetna Life Ins. Co. v. Harworth* (1937), 81 L. Ed. 617.

Judgment Notwithstanding the Verdict: At common law this was really a belated judgment on the pleadings. It would only be used by a plaintiff where a defendant's answer was legally insufficient, which also meant it could perform the function of a belated demurrer. *Ellison v. Greenville etc. Ry. Co.* (1913), 94 S. C. 425, 77 S. E. 723. In other words, a plaintiff could have demurred, but didn't; he could then have gotten judgment on the pleadings, but didn't; he waited until a verdict came in against him; the common law gave him a

third bite at the cherry, and allowed him to obtain judgment notwithstanding the verdict. Some jurisdictions by legislation or judicial sanction, permit the same choice by a defendant. South Carolina as yet has not done so.

In the *Ellison* case, *supra,* it was pointed out at page 431:

> In *Bowdre v. Hampton,* 6 Rich. 213, it is said that judgment *non obstante veredicto,* can be rendered only for a plaintiff. "A judgment upon the special findings of a jury, but against their general verdict, is not really judgment *non obstante veredicto,* although often inaccurately so-called. A motion for judgment *non obstante veredicto,* is a motion for a judgment, on the pleadings without regard to the verdict; but a motion for a judgment, on the special finding of the facts, notwithstanding the general verdict, has no reference whatever to the pleadings in the case, and proceeds upon the theory, that the special finding of facts by the jury, is so inconsistent with their general verdict, that the former should control the latter, and the Court should give judgment accordingly." 11 Enc. Pl. & Pr. 924-5.

South Carolina has Circuit Rule 79 which provides for the same final result, i.e., judgment notwithstanding the verdict, but it is in no way based on defective pleading, but solely upon legal insufficiency of evidence. And it is a condition precedent that one — either a plaintiff or a defendant — come within Circuit Court Rule 76 by making a motion for a directed verdict and having it refused before such party can get the benefit of Rule 79; and the motion is limited to the grounds for a directed verdict. *Standard Warehouse Co. v. A. C. L. Ry.* (1952), 222 S. C. 93, 71 S. E. 2d 893.

It will be noted that a motion for a new trial may be made at the same time — but both motions must be made before the term of court ends.

That judgment on the pleadings is still recognized for either a plaintiff or a defendant in this State is clearly indicated in *Page v. N. C. Mut. Life Ins. Co.* (1945), 207 S. C. 277, 35 S. E. 2d 716, and the *Ellison* case, *supra,* with no later decision to the contrary, still gives to a plaintiff a right to a belated judgment on the pleadings via the common law judgment notwithstanding the verdict, and Circuit Court

rule 79 would have no application to such a judgment for a plaintiff.

Arrest of Judgment: Circuit Court Rule 72 provides for a motion in arrest of judgment in criminal cases and changes the common law in that regard, in that the motion must be noticed within two days after verdict; also, a motion for a new trial may be noticed simultaneously. It does not appear that the South Carolina Supreme Court has as yet had this rule before it for interpretation. At common law in most jurisdictions a motion for arrest of judgment waives the right to make a motion for a new trial.

The old common law rule was used in a few criminal cases. *State v. Rafe* (1899), 56 S. C. 379, 34 S. E. 660; *State v. Syphertt* (1887), 27 S. C. 29, 2 S. E. 624. The common law basic principle that such a motion must be based solely on defects in the record and that the record is what would be on file in the clerk's office and would not include evidence, motions, charge, or rulings at the trial would doubtless apply when using Rule 72.

In the *Syphertt* case it was declared at page 34:

> . . . And first as to the motion in arrest of judgment. Such a motion must be based upon some defect apparent upon the record, and cannot be sustained simply upon the ground of variance between the *allegata* and *probata.* [Cases Cited]

It was further stated beginning at the bottom of page 34:

> This, however, is more an objection to the sufficiency of the evidence than to the sufficiency of the indictment. It is like the case of the *State v. Graham, supra,* where, under an indictment for obstructing a public landing, and the proof being that the public road leading to the landing was obstructed at a point about one hundred yards from the landing, it was held that this constituted no ground for a motion in arrest of judgment, but was a good ground for a new trial. Or like the case of the *State v. Cockfield, supra,* where the indictment was for stealing a plough, and the evidence was that the article stolen was a ploughshare, where a similar ruling was made. Or like the case of the *State v. Hamilton, supra,* where the indictment charged the goods stolen to be the property of one person, when the proof showed them

> to be the property of another; it was held that while this might have furnished a good ground for a motion for a new trial, it afforded no ground for a motion in arrest of judgment. It will be observed that in all three of these cases the indictments were unexceptionable, and might have been sustained under a certain state of the evidence. And so here, under the assumption above alluded to, the indictment, under certain proof, could have been sustained, and hence there is no ground for arrest of judgment.

The old rule was used in South Carolina, but not often, in civil cases. *Brickman v. S. C. Ry. Co.* (1876), 8 S. C. 173. This motion appears to have almost left the legal scene; probably because it worked in too narrow a groove and was very technical. And Rule 72 also seems not to be much used in criminal cases may be for a like reason.

Conclusive Effect of Judgments: In South Carolina one cannot split a cause of action. *Holcombe v. Garland,* past, of 162 S. C. There it was said at page 386:

> "We therefore hold that for a single wrongful or negligent act which injures both his person and his property an individual has but a single cause of action. In this ruling we are supported by the case of *W. & A. R. Co. v. Atkins,* 141 Ga., 747, 82 S. E., 139, where it was held, in denying a motion for a rehearing, that the careless striking of the plaintiff's wagon, whereby he suffered damage both to his person and his property, constituted but a single tort, and that a settlement for the property damage barred an action for damages on account of the personal injuries." *Ga. Ry. & Power Co. v. Endsley,* 167 Ga., 439, 145 S. E., 851, 853, 62 A. L. R., 256.

Mitchell v. Federal Intermediate Credit Bank (1932), 165 S. C. 457, 164 S. E. 136, distinguishes a number of South Carolina cases thus making it a very informative decision, and shows how careful an attorney should be. It also tells one at page 480:

> In the matter before us, the legal wrong which Mitchell suffered was the violation by the bank of his right to receive the proceeds of his potato crop which had come into the bank's hands, amounting to about $18,000.00, and for

> this wrong he had a single indivisible cause of action against the bank. When the bank sued him on his two notes, amounting to about $9,000.00, he had the option to interpose his claim as a defense to that suit or to demand judgment against the bank, by way of counterclaim for the amount owing him by it. He elected to set up his claim as a defense only, and the jury applied it to the payment of the notes held by the bank. The transaction out of which the case at bar arises is the same transaction that Mitchell pleaded as a defense in the Federal suit. He might, therefore, "have recovered in that action, upon the same allegations and proofs which he there made, the judgment which he now seeks, if he had prayed for it." He did not do this, but attempted to split his cause of action, and to use one portion of it for defense in that suit and to reserve the remainder for offense in a subsequent suit, which, under applicable principles, could not be done. As said in the *Miller Company case*: "If in the application of such principles the want of full satisfaction accrues to the plaintiff, it is only because of its [his] own actions, deliberately taken in choosing the method of enforcing its [his] claims and demands."

A Cause of Action Cannot be Split: See the *Holcombe* case, *ante*. A defendant cannot split a cause of action which he could have set up as a counterclaim, thereby using part as a set-off and getting a judgment for the excess over and above a plaintiff's claim. If he uses only a part as a defense and does not plead a counterclaim as to the whole, he forever loses the excess over and above plaintiff's claim. Hence, a defendant's attorney must always be careful of the choice he makes when drawing an answer or a complaint. He cannot use his client's claim partly as a shield first and later partly as a sword.

At this point it should be noted that in South Carolina, as hereinbefore pointed out, service of summons as to a non-resident by publication gives a court no jurisdiction to render a personal judgment. Only the attached property can be used toward paying the judgment and court costs. That exhausts the jurisdiction of the court in such an in rem action. Any balance remaining unpaid can be sued for later, as same would not be merged in the first judgment, and hence there would

be no bar. In this connection see Section 10-933 and annotations.

When is a Judgment a Bar? The well recognized rule is that for a judgment to be a bar, there must be identity of parties and of cause of action, or if there is a different cause of action but identity of parties, then, if there is an identity of issue in the two actions, only that issue will be res judicata. This latter result, though often referred to as a bar, really rests upon the doctrine of estoppel, whereas the doctrine of res judicata rests upon a sound principle of public policy. *Antrum* case, post. Also, where there is identity of parties and of cause of action, then the judgment will in addition be conclusive of any issue "such as might have been raised affecting the main issue." *Johnston-Crews Co. v. Folk* (1922), 118 S. C. 470, 111 S. E. 15.

See also Judge L. D. Lide's in South Carolina Law Quarterly, March 1952.

Griggs v. Griggs (1949), 214 S. C. 177, 51 S. E. 2d 622, at page 188, gives one a specific idea of what a judgment bars:

> A judgment is *"res judicata"* so as to bar a claim in a subsequent action only where rendered upon merits upon same matters in issue and between same parties or their privies, "matters in issue" being that matter upon which plaintiff proceeds by his action and which defendant controverts by his pleadings. *Rogers v. Detroit Automobile Inter-Insurance Exchange,* 275 Mich. 374, 266 N. W. 386, 388.

In *Holcombe v. Garland & Denwiddie, Inc.* (1931), 162 S. C. 379, 160 S. E. 881, an inconsistency of statement exists which leaves one no definite rule. On page 388 it is said:

> The distinction between the "cause of action" and "subject of the action" is clearly pointed out in Bliss on Code Pleading (3d Ed.), 214: "The cause of action has been described as being a legal wrong threatened or committed against the complaining party; and the object is to prevent or redress the wrong by obtaining some legal relief; the subject of the action is clearly neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the Court, nor is that which the Court is asked to do for him, but it must be the matter or thing differing both from the wrong and from the

> relief in regard to which the controversy has arisen, concerning which the wrong has been done; and this ordinarily is the property, or the contract and its subject matter, or other thing involved in the dispute."

While on page 389, the Court stated when referring with approval to *Ophuls & Hill v. Carolina Ice & Fuel Co.* (1931), 160 S. C. 441, 158 S. E. 824:

> . . . In this case was also quoted from Pomeroy's Remedies at page 800, these words: "It would, it seems to me, be correct to say in all cases, legal or equitable, that the 'subject of the action', is the plaintiff's main primary right which has been broken, and by means of which breach a remedial right arises."

It is to be noted that the opinion at this latter stage tells one that the "subject of the action" is not necessarily the "property, or the contract and its subject matter, or other *thing* [italics added] involved in the dispute", but it "is the plaintiff's *main primary right*" [Italics added].

One is then told next what that *primary right* is; and it is described as anything but "property, or the contract" "or other thing involved in the dispute," the language of the Court being:

> Plaintiff's primary right was to use the highway in safety; that primary right was invaded by defendant; there arose a remedial right to plaintiff — the right to recover damages for the injuries and damages to his person and property. How? In one action. What effect does his failure then to pursue his remedy for damages in his first action have upon the second action, when the plea of *res adjudicata* is invoked against the maintaining of the second action?
>
> Nowhere has the law applicable to the doctrine of *res adjudicata* received more careful consideration and clearer elucidation than in the opinion of Mr. Justice Cothran in *Johnston-Crews Co. v. Folk,* 118 S. C., 470, 111 S. E., 15. From that opinion (page 482 of 118 S. C., 111 S. E., 15, 18) we take this: "As to the third element as stated above [subject of the action]: In the case of *Hart v. Bates,* 17 S. C., 35, the element is stated in rather tabloid form thus: 'The precise point must have been ruled.' This requires some amplification. *If the*

identity of the parties and the identity of the causes of action have been established, the former adjudication is conclusive, not only of the precise issues raised and determined, but of such as might have been raised affecting the main issue." [Italics added.]

It will thus be seen that the Court, after giving one an inconsistency as an attempted yardstick, levels off with a clearly definite rule, namely, that a former judgment is conclusive, and therefore a bar, where there is the "identity of parties and identity of the causes of action". Identity of subject matter is not mentioned finally as a part of the legal yardstick or as one of the conditions precedent to such conclusiveness or bar.

There are cases in South Carolina that add "identity of subject matter" as a requirement in the res judicata yardstick. Those decisions which use the phrase "identity of subject matter" use it entirely too loosely. It just happened that in several of those decided cases there was identity of subject matter, as for instance in *Nelson v. Parsons* (1938), 187 S. C. 478, 198 S. E. 401, where the same proceeds of an insurance policy were involved in both suits.

The later case of *Lafitte et al. v. Tucker* (1950), 216 S. C. 201, 57 S. E. 2d 255, uses the phrase "identity of thing sued for" instead of "subject matter", while the latest case, *Antrum v. Hartsville Production Credit Ass'n. et al.* (1949), 228 S. C. 201, 89 S. E. 2d 376 goes back to "identity of subject matter." It was therein held at page 209:

> The doctrine of *res judicata* is a fundamental rule of our jurisprudence and has been so often expounded that no extended discussion of it is necessary here. It rests upon the sound principle of public policy that after final decision of a controversy by a court of competent jurisdiction the party against whom the decision was rendered, and those in privity with him, should not be permitted again to litigate, against the successful party or those in privity with him, the issues that were there decided, 30 Am. Jur., Judgments, Sections 161, 165. While the doctrine has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been there presented for decision, the application of the defensive bar to the latter rests, strictly speaking, upon the doctrine

of estoppel rather than that of *res judicata.* Cf. *Watson v. Goldsmith,* 205 S. C. 215, 31 S. E. (2d) 317; *First National Bank of Greenville v. United States Fidelity & Guaranty Co.,* 207 S. C. 15, 35 S. E. (2d) 47, 162 A. L. R. 1003.

"Before the defense of *res judicata* is made good, the following elements must be shown: (1) The parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided." *Bagwell v. Hinton,* 205 S. C. 377, 32 S. E. (2d) 147, 156. See also *Dunlap v. Travelers Ins. Co.,* 223, S. C. 150, 74 S. E. (2d) 828.

After all the laying down of a general rule can give rise to dangerous precedents. In the last analysis one has to go back to the basic rules of substantive law in order to definitely determine when a judgment will be a bar. Society has laid down rules of public policy which, in turn, spell the individual's personal as well as property rights, and of these rights judgments are finally determinative. As those rights vary, so can the conclusiveness of judgments.

In 50 C. J. S. the last part of Section 718, dealing with "identity of subject matter," calls attention to the fact that a judgment will not be "conclusive where the question in the second suit grows out of the same subject matter, but involves a different question or claim with regard to it."

A 1944 case in Tennessee, *Copeland v. Copeland,* 177 S. W. 2d 555 says:

"A plea of res judicata is not available merely because the subject matter of two suits is the same. The cause of action in the two suits must be the same. Mr. Freeman expresses the rule thus:

'As we have already seen, identity of subject matter is not essential to estoppel by judgment. So in determining whether causes of action are the same, the identity of the subject matter or of the transaction out of which they arise, is not a controlling factor. The subject matter of an action must be distinguished from the cause of action, since the subject matter of two actions may be the same and yet the causes of

action may be entirely different. New rights in the same subject matter may intervene between the two actions.' Freeman on Judgments, Fifth Edition, p. 1434.

As said in *Marks v. Stevens* (1918), 72 Okla. 186, 179 Pac. 7:

> Care must be taken also to distinguish between identity of the subject-matter of litigation and identity of cause of action, a distinction often overlooked. The subject-matter of litigation may be the same, and yet the cause of action may be entirely different.

The court called attention to the fact that this distinction is particularly important where after-acquired rights in the same property are involved, as such rights are never affected by a former adjudication.

Where Ruling is Admittedly Wrong: Greenwood County v. Watkins (1940), 196 S. C. 51, 12 S. E. 2d 545 wherein the decree of Judge Gaston was adopted as the opinion of the Supreme Court, states the rule briefly on page 61:

> It is well settled in this State that the rulings in a case, even though admittedly they be wrong, become the law of the case, and are *res adjudicata* between the parties. *Jenkins v. Southern Railway Co.*, 145 S. C., 161, 143 S. E., 13.

Identity of Parties: This doesn't necessarily mean that the identical persons or individuals must be involved in both suits. It will include one who is in privity with a party, *i.e.* one who legally steps in a party's shoes as representing the same legal right in certain property, such as heir and ancestor. In 1949 *Griggs v. Griggs*, 214 S. C. 177, 51 S. E. 2d 622, used at page 188 the phrase "identity of quality [meaning legal quality] in persons for or against whom claim is made" as a necessary condition precedent to res judicata. This is just another way of stating legal privity.

In that year the *Griggs* case brought on the scene again the inconsistency that "there must be identity in thing sued for". And thus the South Carolina cases leave one finally in doubt as to what is the exact res judicata yardstick.

When is a Nonsuit a Bar? Since a judgment cannot be pleaded in bar of a subsequent action unless it is a final judgment on the merits determining the rights in litigation in a conclusive and definite manner, a nonsuit is usually not res

judicata. There is, however, an exception as is shown by *Smith v. Ins. Co.* (1942), 201 S. C. 291, 22 S. E. 2d 885, where a plaintiff affirmatively proves facts which show as a matter of law he has no case and that he couldn't succeed even if he sued again. In that case the record showed that the plaintiff had theretofore suffered an involuntary nonsuit in the Federal Court and judgment was duly entered for the defendant. The suit in the State Court was upon the same policy. The opinion states:

> At the trial of the present case, before the jury was empaneled, the defendant moved before the presiding Judge, the Honorable T. S. Sease, to dismiss the suit on the ground that the cause of action is *res adjudicata.* This motion was refused and the trial proceeded. The defendant offered in evidence the record of the federal Court and at the conclusion of the evidence moved for a directed verdict on the ground that such judgment concluded all of the issues which were or might have been raised, and that consequently it is *res adjudicata* of all the matters and things involved in this action. This motion was overruled by the presiding Judge, and the jury found a verdict for the plaintiff for $1,658.10 actual damages and $1,241.90 punitive damages. In its sixth, seventh, eighth, and fifteenth exceptions, the defendant contends that his Honor, the presiding Judge, was in error in refusing such motions.
>
> It should be noted that in this case the nonsuit amounted to a judgment upon the merits. In the case of *Morrow v. Atlanta & C. Air Line Ry. Co.*, 84 S. C., 224, 66 S. E., 186, 192, 19 Ann. Cas., 1009, it was said: "A nonsuit is not usually a judgment upon the merits. It was originally given against the plaintiff when he introduced insufficient evidence to support a verdict, or when he refused or neglected to proceed to the trial of the cause, after it had been put at issue. It is different, however, where the plaintiff is nonsuited or a verdict is directed because the evidence introduced by the plaintiff proves affirmatively as a matter of law that he is not entitled to recover. The difference is that in one instance the plaintiff fails to make out his case; in the other instance, he proves affirmatively facts which as a matter of law show that he is not entitled to recover."

See, also, *Hughes v. Southern Ry. Co.*, 92 S. C., 1, 75 S. E., 214; 34 C. J., 783, 893.

The judgment of the federal Court is entitled to the same conclusiveness as is accorded the judgment of a State tribunal. 34 C. J., 1160.

As to Immaterial Matters: South Carolina would most probably follow what seems to be the general rule in this country that res judicata or collateral estoppel does not apply to immaterial matters but extends, as held in *House v. Lockwood* (1893), (N. Y.) 33 N. E. 595, only to the "material facts which are in issue" and "to such as necessarily bear upon, control, and are essential to, the adjudication made."

Is Conviction or Acquittal a Bar to a Civil Action? As to the 1st part of the question, this State has only one case and that is really an exception to the general rule that a conviction is not a bar as the parties are not the same, but at most only raises a prima facie presumption. *Poston v. Horne Ins. Co.* (1939), 191 S. C. 314, 4 S. E. 2d 261, held that a conviction in that particular situation would be conclusive and therefore a bar since the issue was whether the defendant stole his own automobile, and it would be contrary to public policy, if he were convicted, to allow him to recover theft insurance in a subsequent civil suit and thereby profit by his own criminal act.

One gathers from reading the decision that were it not for the element of defendant's profiting from his own wrongdoing, the Supreme Court would have held that there would be no bar but that a conviction would only be presumptive evidence. This is substantiated by the fact that the Court recognized the difference in requirements as to burden of proof in civil and criminal cases, when it said that an acquittal would not be a bar.

In other words, as said in the *Poston* case, *supra*, at page 317:

> The fundamental ground for the continuance, and of the appeal, is the sub-servience of the public interest, and that the interest of justice and of the public at large demands that the case should be continued until the trial of the criminal charges in the Federal Court. Appellant disclaims any question of accommodation to itself. The conviction of respondent upon the charges would be conclusive against him here, because this Court would not

look with favor upon the right of any party to profit by his own criminal act.

But his acquittal would not end this litigation, because whereas the government or the State might fail to prove the charges beyond a reasonable doubt in order to convict, yet the defense in the civil suit could prevail if proven by the greater weight of the evidence. The proof required differs in the two cases. *Booth v. J. G. White Engineering Co.*, 101 S. C., 483, 86 S. E., 32.

Test as to Identity of Causes of Action: As to whether there is identity of causes of action, South Carolina follows the general rule that the best test is whether the same evidence would sustain both, although the two actions are different in form. *Griggs v. Griggs* (1949), 214 S. C. 177, 51 S. E. 2d 622, at page 185, states:

"In the application of the doctrine of *res judicata,* if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible." 30 A. Am. Jur., Sec. 365, at page 407.

"The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the points or question actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein. Ac-

cordingly, before the doctrine of *res judicata* is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se.*" 30 Am. Jur., Sec. 180, at page 925.

Is a Judgment as to an Express Written Contract a Bar to an Action in Quantum Meruit? A negative answer is abundantly supported by the authorities. Since a bar would depend on substantial identity of evidence, and since different proofs are required in the two actions, South Carolina, following the *Griggs* case, *supra,* would undoubtedly follow the general rule. Although in this State if one sues on express contract one can't recover on quantum meruit, *Gantt v. Morgan* (1942), 199 S. C. 138, 18 S. E. 2d 672, still there is the chance of one being allowed to amend his pleading if substantial harm would not thereby be done to one's adversary. Also, there is the great probability that the two causes would not be considered inconsistent and could be joined in the same complaint so that the plaintiff could recover on whichever was proved, though not on both. *Stuckey v. Metropolitan Life Ins. Co.* (1940), 195 S. C. 358, 11 S. E. 2d 391. However, this case should be compared with the earlier case of *Scott v. McIntosh* (1932), 167 S. C. 372, 166 S. E. 345, which has not been overruled and which states positively that a cause of action on a lease cannot be joined with a cause of action on quantum meruit.

Different Injuries from Same Wrongful Act: There is a split of authority as to different injuries from the same wrongful act. In South Carolina if such act injures A's person and his personal property, under *Holcombe v. Garland, ante,* there would be but one cause of action with, however, two items of damages, namely that affecting A and that affecting his property. If one item is left out, it cannot be sued for later. It has become merged in the judgment.

But the more recent case of *Floyd v. C. I. T. Corp.* (1939), 191 S. C. 518, 5 S. E. 2d 299, makes one wonder whether South Carolina has a general yardstick that can be safely used or whether the usable rule depends on the particular situation. In that case, the plaintiff sued for damages to himself for assault, for trespass to his real property, and

for loss of his wife's services. The Court held that all the damages grew out of one incident or one act and therefore there was but one cause of action. It is true that by so holding the result would be that the cause could not be split into two or even three suits, therefore, a multiplicty of suits would be avoided.

As declared by the court in that case at page 522:

> Has plaintiff split a single cause of action into three causes of action? If so, his complaint is fatally defective in that shape.
>
> The rule is thus stated in Bliss on Code Pleading, page 155, Section 118, *et seq.*: "It is a rule that one cause of action — as, one springing from a single contract — cannot be so split as to authorize more than one action; and the same rule would make it improper to so divide a single cause of action, by separate statements in one complaint, as to show more than one cause of action."
>
> The same author says in the same section: "Logically, every wrong furnishes itself a cause of action, *but different wrongs may be so blended as to be called a single wrong, as to furnish but a single cause of action, especially with reference to the policy of the law, which discourages a multiplicity of suits.* A distinguished common-law Judge in New York says: *'All damages arising from a single wrong, though at different times, make but one cause of action; and all debts and demands already due by the same contract make one entire cause of action.'*" (Italics added.)

And further at page 524:

> The question here involved has often been before the Courts of this State, and others, and a review of the authorities demonstrates that a clear preponderance of them supports the rule that where the cause of action grows out of one incident, it cannot be split to support more than one.
>
> "A single cause of action cannot be split either as to relief demanded or grounds on which recovery is sought * * *."
>
> "Splitting a cause of action is the bringing of an action for only a part of the cause of action." 1 C. J. S., Actions, page 1306, § 102.

> "The rule against splitting causes of action applies to causes of action arising *ex delicto*, the rule being that a single wrong gives rise to but one cause of action, for which but one action can be maintained, however numerous the elements or items of damage resulting therefrom may be * * *." 1 C. J. S., Actions, page 1329, § 104.

But doesn't such a holding have its future pitfalls? No, not if one keeps in mind the practical yardstick laid down in the above case. For example, the statute of limitations as to assault is two years. Section 10-145. But one can bring an action for loss of one's wife's services or for trespass on realty anytime within six years. Suppose Floyd had brought his suit during the 4th year. Should any recovery for the assault have been allowed under Section 10-145? Under the rule in the *Floyd* case, it would have been allowed as one of the items of damage flowing from one cause of action in turn growing out of one incident or act, thus avoiding more than one suit. So, in South Carolina the test is: do the damages grow out of one incident or act or do they grow out of several separate and distinct incidents or acts arising at different time intervals?

In distinguishing *Matheson v. Am. Tel. Co.* (1923), 125 S. C. 297, 118 S. E. 617, 618, the *Floyd* case stated:

> In that case the complaint stated two causes of action; one for trespass growing out of an incident which it is alleged occurred in September, 1922, and one for abusive language which it is alleged by the complaint to have occurred October 16, 1922. A motion was made to require the plaintiff to state these causes of action separately. The motion was refused. On appeal this order was reversed. The Court said: "In the appeal from the order refusing the motions of the defendants, there are four exceptions, but they raise the single point that the complaint contains two separate and distinct causes of action, namely, a cause of action for injury and damage to the premises and realty of plaintiff, and a cause of action for injury and damage to the person of the plaintiff *upon another occasion than the trespass;* and that for that reason the defendants were entitled to an order requiring the plaintiff to amend the complaint, making it more definite and certain by separately stating two causes of action." (Italics added.)

> We have underscored the language of the opinion which marks the difference between that case and this with which we are now concrened. . . .

Facts Subsequently Coming into Existence: Neither immaterial facts arising subsequent to the rendition of a judgment will affect the operation of such judgment as a bar, nor will the discovery of new facts which are merely evidentiary. But subsequent new facts or events which create a new legal situation or alter legal rights of litigants will keep a judgment from being a bar or will preclude it from operating as an estoppel, since such rights would not have been in existence at the time of its rendition. *Moseley v. Welch, et al.* (1923), 218 S. C. 242, 62 S. E. 2d 313. In that case the rule was laid down as follows:

> . . . The applicable rule is stated in 30 Am. Jur., Judgments, Section 206, page 943, as follows: "The mere change of facts subsequent to the rendition of a judgment does not necessarily affect the operation of such judgment under the doctrine of *res judicata.* This rule clearly prevails in the case of immaterial facts arising subsequent to the rendition of the judgment. Moreover, the enforcement of the rule of *res judicata* may not be avoided by the discovery of new evidence bearing on a fact or issue involved in the original action, as distinguished from a subsequent fact or event, which creates a legal situation. However, where, after the rendition of a judgment, subsequent events occur, creating a new legal situation or altering the legal rights or relations of the litigants, the judgment may thereby be precluded from operating as an estoppel. In such case, the earlier adjudication is not permitted to bar a new action to vindicate rights subsequently acquired. In this connection, it has been declared that a judgment is not *res judicata* as to rights which were not in existence at the time of the rendition of the judgment."

Finality of Judgments: Under the cases in this State heretofore cited, a judgment to be a bar must be final. It also would follow that a final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. This is the general rule in America which South Carolina would

doubtless follow. As of now this State hasn't directly passed on this question.

Erroneous and Void Judgments: If a judgment is void, it is open to collateral attack in any court, and it is void if rendered by a court having no jurisdiction. If it is merely erroneous because of some judicial error, it is only voidable and is subject merely to direct attack in the trial court that rendered it. *Bradley v. Calhoun* (1920), 116 S. C. 7, 106 S. E. 813. In that case it is declared at page 11:

> . . . No one shall be personally bound until he has had his day in Court; he must be cited to appear and afforded the opportunity to be heard.
>
> "A judgment against a party not named in the camplaint nor any part of the record is void. We cannot presume that one who does not appear to have been a party had his day in Court." Freeman on Judgments (2d Ed.) § 141.
>
> "If the judgment or decree is silent upon the subject of service of summons and the service shown by the return upon the summons is not such as will give the Court jurisdiction, no doubt the judgment is void." Freeman on Judgments, § 133.
>
> If the decrees are void and the parties not served, that is a fatal defect without proof. If it is a voidable judgment and a hidden infirmity which can only appear by proof, in the latter case the infirmity cannot be shown in a collateral manner, but only a direct proceeding instituted for that purpose. *Turner v. Malone,* 24 S. C., 404.

In some jurisdictions if a judgment is rendered pursuant to fraud it is considered void, but in this State it is only voidable and not subject to collateral attack. *Bailey v. Cooley* (1929), 153 S. C. 78, 150 S. E. 473. As said at page 89:

> There can be no controversy over the proposition that, when a Court has complete jurisdiction of a cause and renders judgment therein, its judgment cannot be collaterally attacked in another Court upon the ground of fraud in the procurement of the judgment; the only grounds of attack collaterally are that the Court rendering the judgment was without jurisdiction of the parties

> or subject of the action and the assertion of the fact *nul tiel* record. . . .

Persons Affected by Judgments: Section 10-216 and *Bryant v. Smith* (1938), 187 S. C. 453, 198 S. E. 20, relieves this State of the problem of whether a husband, as a nominal party to his wife's suit, is barred by the adjudication of issues in her case, since he need no longer be such nominal party. Her emancipation is now complete from the rigid common law disabilities. She sues in her own right, just as her husband can sue in his own right.

Joint tort-feasors can be sued jointly or severally and recovery may be had against all or each, but there can be only one satisfaction. *Nat'l Bank of Savannah v. So. Ry. Co. Div.* (1917), 107 S. C. 28, 91 S. E. 972. One is told at page 31:

> . . . The wrong act of one was the wrong act of both; they acted together in concert, and by mutual assistance aided each other in issuing the erroneous bills of lading. The oil mill requested it. The railroad acceded to this request, and issued the bills of lading as asked for. The wrong done to the plaintiff was the joint act of the defendant and the oil mill. Both were joint tort-feasors.
>
> The plaintiff had the right to sue them separately and to recover judgment against each. If the plaintiff had prosecuted both actions to judgment, it could have done so, and then elected which judgment it would collect, but it could have only one satisfaction. The plaintiff could have a judgment against either of the defendants or both, as they were joint tort-feasors, but it could have but one satisfaction for the wrong done. But when the plaintiff obtained its judgment against the oil mill and accepted satisfaction of it, as was done in this case, then under the law the defendant was released from all liability to the plaintiff. There was but a single tort, and by the acceptance of the amount paid on the judgment obtained in the Federal Court and satisfying the same the plaintiff was compensated for all damages it sustained by reason of the wrongful issuance of the bills of lading in the action.

At this point it should be noted that South Carolina stands almost alone in judicially getting away from the old common law rule that in an action against joint tort-feasors a jury cannot apportion the damages. In this State a jury may

apportion the damages and a satisfaction by one such wrongdoer of his share is not a satisfaction for any of the others.

As pointed out in *Smith v. Singleton* (1842), 2 McMul 184, at page 187:

> It is true, we early departed from the English rule, that in a joint action of trespass, the jury cannot sever in their damages. The case of *White v. McNeily*, in 1784, ruled that the jury in such a case might sever and apportion the damages according to the degree and nature of the offence committed by each defendant. The wisdom of such departure is, I think, very questionable; but it has been in practice ever since conformed to; and we are now asked to give it a further extension, by abolishing another well-settled principle, that in several actions for a joint trespass, a recovery against one defendant, the satisfaction of it, and the payment of the costs in the other cases, will bar any recovery against the other defendants.
>
> It is supposed that this principle, and the consequences of a recovery in such a case as *White v. McNeily*, cannot stand together. For it is asked if a recovery against one of several joint trespassers, and satisfaction, be a bar to a recovery against the others, why would not the payment of the damages found against any one of the defendants in a joint action, bar the collection of the damages found against the others? The answer is obvious — in several actions, the law supposes the jury to find against any one, the entire damages sustained by the plaintiff, and therefore, satisfaction in one is satisfaction in all. But in a joint action, when the damages are apportioned, the aggregate of all the damages found is the damage of the plaintiff; and hence satisfaction by one, of his part, is not satisfaction for all, and of the whole.

However, South Carolina's departure from the old common law rule has been strictly applied. It has been said it "should be confined to the precise condition that gave it birth." Hence in cases involving imputed liability, as for example in the master and servant relationship, where they are sued jointly, apportionment of actual damages is not allowed, since the master is liable for the wrongful acts of his servant while the latter is about the former's business.

At the same time one finds a variation there which must not be lost sight of, namely, that punitive damages may be apportioned by the jury since the amount of such damages depends largely upon "the pecuniary conditions of the defendants who are to be punished." *Johnson v. A. C. L. Ry. Co. et al.* (1927), 142 S. C. 125, 156, 140 S. E. 443. This case and *Jenkins v. So. Ry. Co.* (1924), 130 S. C. 180, 125 S. E. 912, both approve the ruling in the *Smith* case, *supra,* and they are worthy of careful study and analysis, since both exhaustively cover various aspects of this topic.

Privies — Who Are? As heretofore pointed out a judgment is conclusive, not only as to a party, but as to any one in legal privity with him. See also *Cathcart v. Matthews* (1916), 105 S. C. 329, 89 S. E. 1021. As said in that case at page 343:

> Neither Cathcart's confinement in the asylum nor the several adjudications of his lunacy is conclusive of the fact of incapacity. The adjudications are not conclusive even upon him or his privies, because he was not formally a party to either of them. They were *ex parte.* For the same reason, they are not binding on defendants. They are only *prima facie* evidence of the fact. *Cathcart v. Sugenheimer,* 18 S. C. 123. The adjudication of July, 1876, that he was sane at that time stands on a different footing, and is conclusive against him and his privies, because he was a party to it. But, of course, it would not preclude proof that he became insane after that time.

Taking the South Carolina cases as to privies, no one case has stated the different kind of privies but taking the cases by and large South Carolina recognizes the four classifications mentioned in *Womach v. City of St. Joseph* (1907), (No.) 100 S. W. 443, which are as follows:

1. Privies of blood, such as heir to his ancestor; 2. privies in representation, as executor or administrator to their deceased testator or intestate; 3. privies in estate, as grantor and grantee, lessor and lessee, assignor and assignee; 4. privies in law, as tenant by curtesy (which doesn't exist in South Carolina) or in dower. See *State ex rel. Brown v. C. & L. R. R. Co.* (1879) 13 S. C. 290. In that case a court's decree had determined that York County had the power to issue certain railroad aid bonds. Did all persons purchasing

such bonds become privies to the decree? Yes, said the court, declaring at page 308:

> . . . Parties acquiring an interest in the subject matter of a suit after action commenced, from or under the parties to such action, apart from the question of notice, are privies, and it certainly cannot be contended that there is a want of identity between the suits in equity merely because persons who are privies under the one are made parties to the other.

Parties such as can be bound include all who are directly interested in the subject matter and had a right to make a defense, or to contest the proceedings, to aduce testimony, cross-examine witnesses and to appeal from a judgment. Otherwise they are strangers and are not bound.

See *Jenkins v. A. C. L. R. R. Co.* (1911), 89 S. C. 408, 1 S. E. 1013, which, while it doesn't come within the basic principle of res judicata, provides for conclusiveness of a judgment because of another requirement of public policy.

In that case Justice Hydrick stated at page 412:

> The question whether the Laurens judgment is a bar to this action is one of interest and importance. In the opinion of the Circuit Court, refusing a motion for a new trial, in *Logan v. R. Co.*, 82 S. C. 522, 64 S. E. 515, the writer of this opinion investigated that question, and undertook to show that the true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata,* or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity. In Logan's case, and also in Rookard's case, 84 S. C. 190, 65 S. E. 1047, it is stated that a judgment on the merits in favor of a lessee railroad company would bar an action against the lessor for the same cause, because

> the liability of the lessor is predicated upon that of the lessee. In other words, if the operating company — the one that actually does the injury — is held not to be liable, it folows that the lessor, upon whom the law imposes liability only for the acts of the lessee, cannot be liable. . . .

Somewhat on a like legal basis is *Tillman vs. Id* (1912) 93 S. C. 281, 76 S. E. 559, where a father, although not a formal party or in privity, was concluded by a decree because he had submitted an affidavit making no claim on his behalf but insisting on the claim of his father and mother to whom he had conveyed all rights to his childrens' custody. As said at page 284:

> It is true that B. R. Tillman, Jr., was not a formal party to that proceeding, but he submitted an affidavit therein making no claim on his own behalf, and insisting on the claim of his father and mother, to whom he had solemnly conveyed all his rights of custody. It is clear that by this action he became bound by the decree rendered in the former proceeding. But that decree expressly declared, in accordance with the well settled law, that an application might be made for a change of custody "upon proof of such material change of conditions as to make such a step proper.

There must be not only Verdict but Entry of Judgment thereon to support Res Judicata, Except When? Durst v. So. Ry. et al. (1931), 161 S. C. 498, 159 S. E. 844, at page 508, states the rule:

> If, upon the verdict of the jury judgment had been properly entered up in favor of the defendant Williams against the plaintiffs, and that judgment had not been interfered with by the lower Court or by this Court on the appeal, the judgment, of course, would have been a bar to the right of the plaintiffs to recover at any future time against Williams on the same cause of action. *Sparks v. A. C. L. R. R.*, 109 S. C. 145, 95 S. E., 344.
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> But a judgment was not entered in favor of Williams, and the general rule is, to which there are exceptions, that the verdict of a jury, upon which no judgment has been entered, is not sufficient upon which to base the plea of *res adjudicata*. 34 C. J., 766. One of the recognized

> exceptions to this general rule, as pointed out by the appellants, seems to be where the parties have acquiesced in the verdict or tacitly or expressly agreed to let it stand in the place of a judgment. *Id.*

But further at page 509 it is pointed out:

> Since all the parties to the action treated the verdict in the first trial as a judgment, and allowed this Court to decide the appeal upon the assumption that the attorneys had followed the law and properly entered up judgments, we are of the opinion that it is too late now for any of the parties to object to the course which they themselves pursued and misled this Court into pursuing. . . .

Attention should be called to the fact that the Act of 1934 (now Section 7-5) allows for an appeal from a verdict without the necessity and expense of entering judgment thereon. However, that Section would not appear to affect the rule laid down in the *Durst* case, *supra.*

Indemnitor and Indemnitee: This phase of res adjudicata has its dificulties, as is shown by *Gadsden v. Geo. E. Crafts Co., et al* (1918), 175 N. C. 358, 95 S. E. 610, which quotes from *Rookard v. Railway Co.* (1909), 84 S. C. 190. The *Gadsden* case stated:

> Speaking of the relation of principal and agent, or master and servant, and with special reference to the question we are now discussing, the court said, by Justice Hydrick in Rookard v. Railway Co., 84 S. C. 190, at page 191, 65 S. E. at page 1047, 27 L. R. A. (N. S.) at page 436, 137 Am. St. Rep. 839: . . . "A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal. A judgment against the principal would not conclude the agent, unless the agent had been vouched, or given notice and an opportunity to defend" — citing numerous authorities. . . .

Beneficiaries of a Class Suit: Under Section 10-205 where many have a common or general interest, one or more may sue or defend for all as a convenience and also to prevent a probable failure of justice. Since it would often be impractical to bring many persons before the court and as there would

be little, if any danger that the common interest of those not made formal parties would suffer, a final judgment is res judicata as to the rights of the entire class. *Evans v. Creech* (1938), 187 S. C. 371, 197 S. E. 365. As said at page 375:

> The Code Commissioner has appended as a note to Section 406 [now Section 10-205], above quoted, the following:
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> "This section is discussed at length in Pom. Code Remedies, wherein it is said: 'The construction of this section of the Code has been established by the courts, and the rule is settled, as already stated, that, where the question to be decided is one of common or general interest, to a number of persons, the action may be brought by or against one for all the others, event though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the questions at issue; and the necessary facts to bring the case within one or the other of these conditions must be averred.' "
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> In the case of *Faber v. Faber*, 76 S. C., 156, 56 S. E., 677, the Court considered Section 140 (now Section 406) of the Code, Mr. Justice (afterwards Chief Justice) Gary, for the Court, said (page 679):
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> "The reason for this rule is thus stated in *Smith v. Swormstedt,* 16 How., 288, 303, 14 L. Ed., 942: 'Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuations, by death or otherwise, that it would not be possible without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the Court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger